Supreme Court, U. S.
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No. 76-1727

IN THE

# Supreme Court of the United States

October Term, 1976

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CLYDE J. MALLEY, Warden,
*Petitioner,*

v.

JOHNNY JAMES,
*Respondent.*

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## RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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Respondent Johnny James respectfully submits this brief in opposition to certiorari. This brief addresses the petition for certiorari filed in this Court on June 6, 1977.

## OPINIONS BELOW

The Court of Appeals' opinion is reported at 553 F.2d 59 (10th Cir. 1977). The District Court's opinion was not reported.

## QUESTIONS PRESENTED

1. Did the filing of a habitual offender petition against respondent, only after his successful appeal and retrial, violate his right to due process of law as guaranteed by U.S. Const. amend. XIV?

2. Can a defendant's sentence, which was originally two one to five year concurrent terms, be modified after retrial to two consecutive one to five year terms when the reason for the modification does not appear on the record?

## STATEMENT OF THE CASE

On January 21, 1971, the District Court for the Eleventh Judicial District, State of New Mexico, sentenced respondent to two one to five year terms following his conviction of one count of burglary and one count of receiving stolen property contained in cause 3539. These sentences were to run concurrently.

Respondent appealed these convictions to the New Mexico Court of Appeals. That court reversed both convictions and remanded the case for a new trial. *State v. James*, 83 N.M. 263, 490 P.2d 1236 (App. 1971).

Respondent was again convicted on each of the two counts in cause 3539 after his second trial. Thereafter, he was resentenced to a one to five year term on each count. The trial court, however, ordered these terms run consecutively.

After respondent's second conviction and sentencing, the district attorney filed a criminal information alleging that respondent was a habitual offender under the provisions of Sections 40A-29-5 and 40A-29-6, N.M.S.A. (1953 Comp.). The information alleged that respondent had been convicted in the District Court for the Eleventh Judicial District of grand larceny on October 16, 1961; breaking and entering on January 22, 1962; burglary on November 12, 1963; larceny on March 15, 1965; burglary on February 6, 1968; and burglary and receiving



stolen goods on February 9, 1972. R. Vol. I, pp. 31-3. Although the same district attorney prosecuted respondent in each of his previous trials and in his first trial on cause 3539, this was the first time the district attorney filed a habitual offender petition against respondent. R. Vol. I, p. 26. The State of New Mexico made no effort to explain its reasons for increasing respondent's sentence only after retrial. 553 F.2d at 62.

The District Court entered its third Judgment and Sentence in cause 3539 on March 6, 1972, following respondent's conviction on the habitual offender petition. This order sentenced respondent to life imprisonment.

## REASONS FOR DENYING THE WRIT

This Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969), held that the due process clause protects a defendant from both actual vindictiveness and the fear of retaliation for exercising his right to appeal. To implement this protection this Court required that whenever the same judge imposes a more severe sentence after retrial his reasons for doing so must affirmatively appear upon the record. This principle was extended to prosecutorial conduct in *Blackledge v. Perry*, 417 U.S. 21 (1974).

In the instant case, as in *Pearce* and *Blackledge*, respondent's sentence was increased after his appeal and retrial. The court below, in applying the standards set forth in those cases, "conclude[d] that in the absence of evidence to the contrary, the filing of the habitual criminal charge was not unrelated to his having appealed." 553 F.2d at 61. As a result, that court vacated respondent's life sentence.

Petitioner contends that this Court should grant certiorari to review the decision below since that decision purportedly conflicts with this Court's decisions in *Pearce* and *Blackledge*. The main thrust of petitioner's brief, however, is that procedural requirements set forth in *Pearce* and *Blackledge* are inapplicable to the instant case, since the prosecutor has a "mandatory"

duty to invoke the sanctions of the Habitual Offender Act. See Section 40A-29-5 N.M.S.A. (1953 Comp.).

The mere characterization of the prosecutor's duty as "mandatory" does not prevent New Mexico's prosecutors from utilizing the Act's sanctions to retaliate against a defendant for exercising his right to appeal.

The court below, after examining *State v. Baldonado*, 79 N.M. 175, 441 P.2d 215 (App. 1969), found that the State's district attorneys do not always file an information under the Habitual Offender Act in each instance in which it is possible to do so. 553 F.2d at 62. Judge Mack Easley, now a Justice of the New Mexico Supreme Court, also found that the state's district attorneys,

> have no set procedure for filing habitual offender charges, but in the discretion of the office, they file in an irregular fashion with resultant procedures being discriminatory, selective, arbitrary and uneven.
>
> 8. Also . . . as a part of the normal and customary practice of the District Attorney's office, Fifth Judicial District, State of New Mexico and other districts as well, filing of habitual criminal charges or the possibility of such filing is used as a part of plea bargaining procedures. *State v. Leck*, D.C. Eddy County No. 6501 (Sept. 25, 1975), *rev'd on other grounds, State v. Leck*, Court of App's No. 2289 (Nov. 18, 1975).

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The district attorney for New Mexico's Eleventh Judicial District chose to disregard this "mandatory" duty and failed to invoke the sanctions of the Habitual Offender Act against respondent on five occasions (including his first trial on cause 3539). It was only after respondent appealed, was retried and reconvicted that the prosecutor chose to comply with the "requirements" of the Habitual Offender Act. The court below found that this unexplained, selective application of the Act "constitutes an interference with [respondent's] right of appeal



and is thus a violation of the due process clause of the Fourteenth Amendment." 553 F.2d at 62.

The decision of the court below is consistent with the decisions of the other Circuit Courts which have resolved the question. *U.S. v. Johnson*, 537 F.2d 1170 (4th Cir. 1970); *U.S. v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976); *U.S. v. Anderson*, 514 F.2d 583 (7th Cir. 1975); *U.S. v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974). These courts found the prosecutor's failure to explain his reasons for the delay until after retrial in seeking the increased sentence violated the defendent's right to due process.

The court below did not order the reinstatement of respondent's original sentence, two one to five concurrent terms. Instead, that court directed the reinstatement of the consecutive sentences respondent received after retrial. Petitioner contends that this order "indicates a failure [by the court below] to appreciate the principles enunciated in *Pearce* and its progeny." Petitioner's Brief for Certiorari at 6.

The rule announced in *Pearce* only prevents a court from increasing, without explanation, the length of a defendant's sentence at retrial. The rule does not prevent the court from converting two concurrent sentences into consecutive sentences so long as the total time to be served does not exceed the term of the original sentence. *Taylor v. U.S.*, 475 F.2d 1121 (6th Cir. 1973); *U.S. v. Clutterbuck*, 445 F.2d 839 (9th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971); *Thurman v. U.S.*, 423 F.2d 988 (9th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970). See also *U.S. v. Williams*, 534 F.2d 119 (8th Cir. 1976), *cert. denied*, –U.S.–, 50 L.Ed.2d 177 (1976).

## CONCLUSION

The decision of the court below in invalidating the increase in respondent's sentence is consistent with this Court's decisions in *Pearce* and *Blackledge*. That court found that the prosecutor's

unexplained delay in seeking the imposition of the increased sentence constituted a denial of respondent's right to due process of law guaranteed by the Fourteenth Amendment. For this reason, review by this Court should be denied.

Dated July, 1977.

Respectfully submitted,

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## APPENDIX

IN THE DISTRICT COURT OF EDDY COUNTY
STATE OF NEW MEXICO

| | | |
|---|---|---|
| STATE OF NEW MEXICO, Plaintiff, | ) | |
| vs. | ) | No. 6501 |
| JAY B. LECK, Defendant. | ) | |

### DECISION OF THE COURT

The Court adopts the following

**Findings of Fact**

1. On November 25, 1974, following jury trial on October 9, 1974, at which a verdict of guilty with recommendation of clemency was returned, Jay B. Leck was sentenced to not less than one nor more than five years in Cause No. 6410, Eddy County.

2. On November 23, 1974, Jay B. Leck, while a passenger in a work car owned by Warton Drilling Company and used by its employees as a crew car, discharged a .44 Magnum Ruger Blackhawk and, as a result, took the life of Donald Lee Eggleston.

3. On December 9, 1974, by criminal information filed in Cause No. 6501, Eddy County, Jay B. Leck was charged with murder in the first degree contrary to Sec. 40A-2-1, N.M.S.A., 1953 Comp.

4. Following plea bargain procedures Jay B. Leck was allowed to plead guilty to involuntary manslaughter contrary to Sec. 40A-2-3 and Sec. 40A-2-3B; this was accepted by this

Court on March 31, 1975, and sentence of not less than one nor more than five years, consecutive to that same period assessed as the sentence in Cause No. 6410, was given on May 20, 1975.

5. On May 15, 1975, by supplemental information filed in Cause No. 6501, Jay B. Leck was charged as being a habitual offender and on May 20, 1975, at the arraignment defendant remained mute, allowing the Court to enter a plea of not guilty to that charge.

6. On July 9, 1975, at the hearing on the habitual offender charge, Jay B. Leck waived his right to a trial by jury on the issue of identity in Cause Nos. 6410 and 6501 and stipulated he was the same person charged in both those matters. This waiver and admission were accepted by the Court, no objection being made.

7. At that hearing on July 9, 1975, by testimony of David L. Hoglund, Assistant District Attorney, Fifth Judicial District, State of New Mexico, it was developed that this District Attorney's office, and other Districts as well, have no set procedure for filing habitual offender charges, but in the discretion of the office, they file in an irregular fashion with resultant procedures being discriminatory, selective, arbitrary and uneven.

8. Also by testimony of David L. Hoglund it was developed that as a part of the normal and customary practice of the District Attorney's office, Fifth Judicial District, State of New Mexico and other Districts as well, filing of habitual criminal charges or the possibility of such filing is used as a part of plea bargaining procedures.

9. By Mr. Hoglund's testimony it was further developed that in other capital cases filed by his office involving the same capital charge as initially filed against Jay B. Leck in Cause No. 6501, defendants were allowed to plead to reduced charges following plea bargaining proceedings, and as part of the plea and disposition agreements in those other cases it was agreed the District Attorney would not file habitual offender charges.

The Court adopts the following



**Conclusions of Law**

1. Defendent Jay B. Leck has standing in Cause No. 6501 to challenge the Habitual Criminal Act of the State of New Mexico, Sec. 40A-29-5 et seq., N.M.S.A., 1953 Comp., as being unconstitutional on its face and as applied in this cause.

2. The New Mexico Habitual Criminal Act, Sec. 40A-29-5 et seq., N.M.S.A., 1953 Comp., is unconstitutional on its face as being contrary to the cruel and unusual punishments clauses of U. S. CONST., Amendment VIII, and N. M. CONST., Art. II, Sec. 13.

3. The New Mexico Habitual Criminal Act is unconstitutional on its face as being contrary to the equal protection clauses of U. S. CONST., Amendment XIV, Sec. 1, and N. M. CONST., Art. II, Sec. 18.

4. The New Mexico Habitual Criminal Act as applied in Cause No. 6501 is unconstitutional as being contrary to the cruel and unusual punishments clauses of U. S. CONST., Amendment VIII, and N. M. CONST., Art. II, Sec. 13, and the equal protection clauses of U. S. CONST., Amendment XIV, Sec. 1, and N. M. CONST., Art. II, Sec. 18.

All Requested Findings of Fact and Conclusions of Law submitted by the parties hereto at variance herewith and not adopted herein are hereby refused.

s/ MACK EASLEY

DISTRICT JUDGE